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No. 73-535

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

FRANCIS R. SALAZAR,
Petitioner,

versus

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1973

FRANCIS R. SALAZAR,
Petitioner,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE TENTH CIRCUIT

FRANCIS R. SALAZAR, Your Petitioner, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above case on August 24, 1973.

OPINIONS BELOW

The unpublished opinion below is reproduced in the Appendix at pp. A-1, infra.

The appeal below was from an order which simply denied a Motion for New Trial on Grounds of Newly discovered Evidence subsequent to Petitioner's conviction of conspiracy to misapply (18 U.S.C. §371) and one of eleven substantive counts of "misapplication" of moneys of a state "insured bank" in violation of 18 U.S.C. §656.[1]

1. Petitioner's original conviction was affirmed on appeal in *United States vs. Cooper*, 464 F.2d 648 (10th Cir., July 12, 1972) Rhg. den., August 25, 1972; Petition for Certiorari den. *Salazar vs. United States*, 490 U.S. 1107, Rhg. den. February 20, 1973, 410 U.S. 959.

JURISDICTION

The Judgment of the Court of Appeals for the Tenth Circuit was entered August 24, 1973, and this Petition for Certiorari was filed within thirty days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Does 18 U.S.C. §656 contemplate that conclusive evidence of no financial loss is immaterial in a prosecution for "misapplication" of bank funds pursuant to said statute, either as to the element of "intent" or otherwise.

2. Where the Government in prosecuting an alleged "misapplication" of bank funds in violation of 18 U.S.C. §656 injects into the case by argument and speculative, conjectural and opinionated evidence the spectre of substantial financial losses to the bank, which newly discovered evidence conclusively shows to be untrue, is a defendant denied due process of law by denial of a motion for new trial based on said newly discovered evidence.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V

"No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."

STATUTES INVOLVED

18 U.S.C. §656 provides:

> *Theft, embezzlement, or misapplication by bank officer or employee* - Whoever, being an officer, director, agent or employee of, or connected in any capacity with any Federal Reserve bank, member bank, national bank or insured bank, or a receiver of a national bank, or any agent or employee of the receiver, or a Federal Reserve Agent, or an agent or employee of a Federal

Reserve Agent or of the Board of Governors of the Federal Reserve System, embezzles, abstracts, purloins or willfully misapplies any of the moneys, funds or credits of such bank or any moneys, funds, assets or securities intrusted to the custody or care of such bank, or to the custody or care of any such agent, officer, director, employee or receiver, shall be fined not more than $5,000 or imprisoned not more than five years, or both; but if the amount embezzled, abstracted, purloined or misapplied does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

As used in this section, the term "national bank" is synonymous with "national banking association"; "member bank" means and includes any national bank, state bank, or bank and trust company which has become a member of one of the Federal Reserve banks; and "insured bank" includes any bank, banking association, trust company, savings bank, or other banking institution the deposits of which are insured by the Federal Deposit Insurance Corporation." (June 25, 1948, c. 645, § 1, 62 Stat. 729.)

STATEMENT OF THE CASE

The jurisdiction of the District Court initially was based upon a Federal Superseding Indictment charging violations of 18 U.S.C. §§656 and 371. The Petition herein is directed to the Judgment of the United States Court of Appeals for the Tenth Circuit affirming an order of the District Court denying a Motion for New Trial on the Grounds of Newly Discovered Evidence.

Prior to Petitioner's trial below, in ruling on various pre-trial motions, the Trial Court stated:

> "Of course, I assume that it will have to be established not that the bank necessarily lost the funds but that the person was insolvent. I do not think they are going to be able to get to the jury with this case if they don't prove something to that effect, in other words, that this had an adverse effect on the assets of the bank one way or the other, either by having a loan from [to] a person that was insolvent *or that the bank actually lost as a result of it.*" (R., July 24, 1970, 13; italics supplied).

In his opening statement at trial, Mr. Branch, the prosecutor, told the jury:

> "The evidence will show that during the course of time alleged in the indictment that because of the actions of the officers and directors of the Rocky Mountain Bank, and in particular the actions of the defendants in this case who were officers and directors of the Rocky Mountain Bank, that approximately $510,000 of the money of the Rocky Mountain Bank was misapplied by these individuals *and of this $510,000 approximately $200,000 was lost to the bank.*" (II R. 30 italics supplied).[2]

The prosecutor to the jury also labelled the substantive counts of the Superseding Indictment as being "... the *misappropriation* [not "misapplication"] of certain moneys of the bank." (Italics supplied).

Further, during trial, I. Tom Curry, the former executive vice-president, cashier and vice-chairman of the board of directors of The Rocky Mountain (the bank involved), who had been in charge of the commercial loan department of the bank, testified over objections by Petitioner's counsel (VIII R. 1088-1090) that at three o'clock

2. References are to the Record on Appeal in the court below, Volume I and XVI containing the Record of Proceedings on the Motion for New Trial on Grounds of Newly Discovered Evidence and Volume II and subsequent volumes contain the original trial record.

p.m. on January 30, 1969, he was given a notice of a take-over of the bank by the Colorado State Bank Commissioner; that he was immediately introduced to a George Hill from the Federal Deposit Insurance Corporation and that:

> ". . . The doors of the bank were locked. Guards were placed at the door. I would judge there was approximately 30 or 35 bank examiners and approximately six representatives from the Jefferson County Sheriff's Office." (VIII R. 1091)

and that keys were immediately asked for ". . . to all of the desks and keys to all of the – well, everything in the building" (VIII R. 1091) as well as keys to the building itself (VIII R. 1091) and that the records of the bank were immediately locked up and examiners were the only ones who had access to said records (VIII R. 1091), and he further testified that there was in excess of two million dollars in loans which were questioned or criticized by bank examiners (VIII R. 1179-1181).

A state bank examiner testified he went to the bank "To take charge of the bank"; posted a notice to this effect on the front door and handed Mr. Curry a similar notice ". . . to the effect that the bank was in the hands of the state bank commissioner" and that they took charge of all of the assets and records, which were sealed, and received keys to the bank which he kept in his custody and control until the next day when they were turned over to the liquidating agent for the Federal Deposit Insurance Corporation (III R. 247-248). Another Government witness, Tom Zelazny, testified he was ". . . the liquidator of Rocky Mountai Bank" (IV R. 543; VII R. 956).

The Government's summary witness, FBI agent, Wallace Glover, testified not only as to the distribution of the loan proceeds of the loans involved in the various counts of the Superseding Indictment, but further testified in great detail as to *subsequent* loan transactions and other *subsequent* transactions, none of which involved misapplication of bank

funds, which showed the source of funds for repayment of loans charged in the Superseding Indictment as being "misapplication" of bank funds.

The Colorado State Bank Commissioner, a defense witness, over objections, on cross-examination, testified:

"Q. Now, isn't it true, sir, that you – that if you had not borrowed this $3 million from the FDIC that some of the depositors would have lost money?

* * *

A. If I had not borrowed $3 million in all probability the depositors with over $20,000 in their accounts would have suffered some loss." (X R. 1686).

Further, he testified that had he not borrowed an additional $400,000 from the FDIC "I think additional losses would have been suffered by the bank . . ." (X R. 1688).

During his closing argument, Mr. Branch emphasized substantial losses to the bank (XV R. 2563) and referred to the fact that " . . . there was something like two million dollars worth of questioned loans at that time in the bank . . ." (XV R. 2568-2570). He also told the jury in closing argument as to Count VIII, there was a loss in the amount of $58,000 plus interest (XV R. 2563) and as to certain defendants, including Petitioner, that these men sat as members of the board of directors and acted as fiduciaries for the stockholders and depositors and then they came before the jury and told them "Well, this was done for the interests of the bank and *there was no loss*" (XV R. 2563; italics supplied).

The foregoing examples clearly indicates the Government relied upon very substantial losses to the bank, and in some cases, the speculation as to said financial losses, were, of a general nature, not involving any specific count of the Superseding Indictment.

The Trial Court instructed the jury that " . . . specific intent must be proved before there can be a conviction" (XV

R. 2581) and defined "specific intent" as being more than a mere general intent and that it's " . . . an act which the law forbids . . ." (XV R. 2581), the Trial Court further instructing:

> "Intent ordinarily may not be proved directly because there is no way of fathoming or scrutinizing the operations of the human mind, but you may infer the defendant's intent from the surrounding circumstances. You may consider any statement made and done or omitted by the defendant *and all other facts and circumstances* in evidence which indicate his state of mind. It is ordinarily reasonable to infer that a person intends the natural probable consequences of acts knowingly done or knowingly omitted." (XV R. 2582: italics supplied).

The Court further instructed:

> "To act with intent to defraud means to act willfully and with a specific intent to deceive or to cheat, ordinarily for the purpose of either causing some *financial loss to another* or bringing financial gain to oneself. However, as I have told you, the evidence in the case need not establish that the United States or any other person was actually defrauded, but only that the accused acted with intent to defraud." (XV R. 2590; italics supplied).

On March 5, 1973, trial commenced in the case of *Federal Deposit Insurance Corporation vs. Delmar E. Cooper, et al.*, United States District Court for the District of Colorado, Case No. C-2530, whereby plaintiff sought to recover civilly financial losses allegedly incurred as a result of the transactions involved in the criminal trial of Petitioner, and evidence by and admissions made on behalf of the plaintiff disclosed that there would be a very substantial profit, not loss, even after deduction of administrative costs of liquidation which had then exceeded $300,000. Further, the bank stock which originally cost somewhere in the

neighborhood of $100 per share, upon completion of liquidation, will be worth approximately $134 per share or more. Also, Petitioner then learned of the existence of Exhibit A-AP-213 The Rocky Mountain Bank (XVI R. 46) an official letter of the Federal Deposit Insurance Corporation, which further substantiated the fact there would be no financial loss and which pertained to but the largest of a total of 324 unliquidated assets still held by the FDIC subject to liquidation. Based on these facts, Petitioner filed a verified Motion for New Trial on the Ground of Newly Discovered Evidence (XVI R. 9) some time between approximately between 1:30 and 2:00 o'clock P.M. on March 9, 1973, and at approximately 4:06 o'clock P.M. on said date, a Friday, the trial court hurriedly set said motion for hearing the following Monday, March 12, 1973, at 8:45 o'clock A.M.

During the hearing on said Motion for New Trial, the District Court accepted Peitioner's *verified* motion " . . . as stating accurate facts . . . ." Further, the District Court in denying said Motion for New Trial stated *inter alia*, that:

> " . . . For the purpose of this motion and the court's ruling on it, I will assume that the ultimate liquidation will provide or establish that a loss was not sustained by the stockholders in this case, but in the case itself there was considerable evidence of intent to deceive, and that very well may be what the jury made its decision on." (I R., March 12, 1973 hrg. 25).[3]

3. Neither 18 U.S.C. § 656 provides, nor does the Superseding Indictment charge defendants with an intent to "deceive". On the contrary, an intent "to injure or defraud" is the essence of a criminal misapplication, not an intent to "deceive", as the prosecutor argued, on the Motion for New Trial on Newly Discovered Evidence, by stating "I think the key here is not an intent to injure, but *deception* to the bank, whether or not the bank suffered any loss." (I R. 12; emphasis supplied). 18 U.S.C. § 1005 pertaining to "false entries" requires an . . . intent to injure or defraud . . . or to deceive . . ." as an element of the offense of "false entry", in a bank's books, and although Petitioner was never charged with any offense pursuant to 18 U.S.C. § 1005, the

In conclusion, the District Court stated:

"The newly discovered evidence as claimed by the defendant *is not newly discovered evidence.* (Court's emphasis). It is merely evidence that confirms what the defendants contended at trial, that is that the bank did not sustain or suffer a loss in connection with at least these specific loans which are alluded to and possibly the overall liquidation picture here of this bank.

"For the reasons that I have stated in my discussion, the motion for new trial of Defendant Salazar on the ground of newly discovered evidence is denied." (I R. March 12, hrg. 29).[4]

From this ruling, a notice of appeal was filed March 12, 1973, and the United States Court of Appeals for the Tenth Circuit affirmed said ruling in its opinion set forth at page A-1, et. seq., infra.

REASONS FOR GRANTING THE WRIT

I.

IN CONSTRUING 18 U.S.C. §656 TO THE EFFECT THAT EVIDENCE OF NO FINANCIAL LOSS IS NOT MATERIAL TO A PROSECUTION

3. prosecutor argued and the District Court concurred that a new trial should be denied because of ". . .considerable evidence of intent to deceive . . ." The offenses of "misapplication" and "false entries" are separate and distinct under 18 U.S.C. §§ and 1005, although both of said offenses were covered by former Rev. Stat. § 5209 and 12 U.S.C. § 592. Obviously a conviction for "misapplication cannot be sustained on the basis of evidence claimed to be sufficient to sustain a conviction for "false entries".

4. Obviously, the newly discovered evidence *conclusively* confirmed ". . . what the defendants contended at trial . . ." and this evidence went directly to the element of the offense of an "intent to injure or defraud" the bank.

FOR "MISAPPLICATION" OF BANK MONEYS OR FUNDS, THE COURT OF APPEALS FOR THE TENTH CIRCUIT BELOW HAS RENDERED A DECISION IN CONFLICT WITH DECISIONS OF THIS COURT AND WITH DECISIONS OF OTHER FEDERAL COURTS OF APPEAL.

The nebulous character of the phrase "willfully misapplies" as used in 18 U.S.C. §656 again raises its ugly head. In 1882, in *United States vs. Britton,* 107 U.S. 655, 669, 27 L.Ed. 520, 2 S.Ct. 512, this Court stated:

> "The words 'willfully misapplied' are, so far as we know, new in statutes creating offences, and they are not used in describing any offence at common law. They have no settled technical meaning like the word 'embezzle' as used in the statutes, or the words 'steal, take and carry away,' as used at common law . . ."

Further, the Court stated that to constitute the offense of willful misapplication there must be "a conversion" of the moneys and funds of the banking association by the party charged.

United States vs. Northway, 120 U.S. 327, 30 L.Ed. 664, 7 S.Ct. 580 (1887), reaffirmed that:

> " . . . The essence of the criminality of the misapplication *is* that there should be a conversion of the funds to the use of the defendant, or of some other person other than the association, with intent to injure and defraud the association . . ."

in reliance upon *United States vs. Britton,* supra.

In *United States vs. Britton,* 108 U.S. 193, 197, 27 L.Ed. 701, 2 S.Ct. 526, as to the first count of the indictment, the Court took particular pains to note as to a president and director of a banking association who, while being insolvent, procured to be discounted his own note, the payee and endorser thereof also being insolvent, and, that Section 5209 of the Revised Statutes did not prohibit this practice, the Court further noting:

> " . . . The discount may have turned out to be a benefit of the association, for there is no averment that the note was not paid at maturity *or that the association suffered any loss by reason of its discount."* (Italics supplied)

In *Coffin vs. United States,* 156 U.S. 432, 39 L.Ed. 481, 15 S.Ct. 394 (1894), the Court again recognized that "conversion" was an essential element of "misapplication" and the various counts of the indictment there involved specifically alleged various sums were "lost" to the bank. In *United States vs. Heinze,* 218 U.S. 532, 54 L.Ed. 1139, 31 S. Ct. 98 (1910), "conversion" was again recognized as the essence of the offense the Court noting as to *Evans vs. United States,* 153 U.S. 584, 38 L. Ed. 830, 14 S.Ct. 934 (1894), that the misapplication alleged in the indictment therein involved a discounted note " . . . which note was never paid, by reason of which the bank suffered loss in that amount . . ." and as to *Coffin vs. United States,* supra, that:

> " . . . The proposition that the law required an actual conversion was yielded to, and that there must be an averment of it . . . ." (218 U.S. 543),

and, that the indictment in *Coffin vs. United States,* supra, described the conversion "to consist of paying money out of the funds of the bank to a designated person when that person was not entitled to take the funds, and that, owing to the insolvency of such person, *the money was lost to the bank."* (218 U.S. 544; italics supplied).

Count V of the Superseding Indictment herein (the only substantive count as to which Petitioner was convicted), containing language typical of other counts, merely alleged Defendant and certain co-defendants, described as officers and/or directors of a named insured bank, on a specified day:

> " . . . with intent to injure and defraud said bank, did willfully misapply the sum of $65,000.00, of the moneys, funds and credits of said bank in that they did cause to be made to their own benefit a loan of the $65,000.00 to Harvey Alpert and

> Michael Cooper and concealed the defendants' interests therein from the bank, in violation of Title 18 United States Code, Section 656."

This did not amount to an allegation of a "conversion" nor did the Indictment otherwise allege that Alpert or Cooper were "insolvent" or that said note was not well secured. As a matter of act, the Trial Court clearly recognized:

> *"Alpert was solvent.* I remember that. So let's go on, and he was on the note and *he was solvent. That was a good note financially."* (X R. 1556; italics supplied).

The Court further stating:

> "Yes, Alpert's note was good . . ." (X R. 1637).

The very definition of a fraudulent "conversion" connotes when applied to money or other property the "loss" of same, regardless how temporary such loss might be.

Federal Courts of Appeal have struggled throughout the years as to the meaning, scope and extent of the phrase "willfully misapplies" as used in 18 U.S.C. §656 and predecessor statutes, but in the past have consistently followed the concept of *United States vs. Britton,* supra, that a criminal "conversion" is an essential element of the offense of "misapplication", as is illustrated by *United States vs. Mattsinger,* 191 F.2d 1014, 1017-1018 (3rd Cir., 1951); *United States vs. Wiggenhorn,* 312 F.2d 289 (9th Cir., 1963); *Mulloney vs. United States,* 79 F.2d 566, 581 (1st Cir., 1935); *United States vs. Eastman, 182 F. 551, 552 (D.C. Cir., 1904); and Jewett vs. United States,* 100 F. 832 (1st Cir., 1900). Further, in *United States vs. Martindale,* 146 F 280, 282 (D.C. Kans., 1903), the Court stated:

> " . . . It has been expressly ruled by the Court of Appeals of this circuit that to complete the misapplication of the funds of a bank, *it is necessary that the funds should be withdrawn from the possession or control of the bank, or a conversion thereof in some form should occur, so*

> *that the bank loses the same.* Dow et al. v. United States 82 Fed. 904, 27 C C A. 140, 49 U.S. App. 605; Mohrenstecher et al. v. Westerfelt, 87 Fed. 157, 30 C C A. 584, 57 U.S. App. 618 . . . ." (Italics supplied)

Batchelor vs. U.S., 156 U.S. 426, 429, 39 L.Ed. 478, 15 S. Ct. 446 "repeats emphatically the rule that these words [willfully misapplies] have no settled technical meaning . . ." *(Jewett vs. United States,* supra).

In *United States vs. Sorensen,* 330 F.Supp. 642, 644 (D.C. Mont., 1971), the Court stated:

> " . . . There must be a *probability* (Court's emphasis) of loss sufficient to warrant finding beyond a reasonable doubt that there was an intent to injure or defraud the bank (Citing *United States vs. Mulloney,* 8 F.Supp. 674, 677 (D. Mass., 1934)) . . ."

The Court further stating at 330 F. Supp. 645 that there was " . . . not an actual loss to the bank or to the depositors . . ." and that:

> ". . . It can be said as a matter of law that there was not a sufficient probability of loss to the depositors of the bank from which the requisite intent to defraud or injure the bank may be inferred."

and the Court further recognized on the basis of *Seals vs. United States,* 221 F.2d 243, 249 (8th Cir., 1955) that:

> "* * * Financial responsibility and repayment are material considerations on the issue of intention to defraud. United States v. Wicoff, 7th Cir., 187 F.2d 886; United States v. Klock [2 cir., 210 F.2d 217]; United States v. Matot [2 Cir., 146 F.2d 197]." (330 F. Supp 645.[5]

5. It stands admitted in the instant case that the loan involved in Count V (the only misapplication count as to which Petitioner was convicted) was fully repaid with interest, and since Petitioner was convicted despite said repayment, the jury must have placed critical weight and importance upon the Government's speculative and opinionated evidence and argument of a very substantial financial loss to the bank.

In *United States vs. Wiggenhorn*, supra, at 312 F.2d 292, the Court specifically noted:

"There is no allegation in the indictment that the moneys, funds or credits of the bank were to any extent depleted or diminished or that the bank suffered even a momentary loss. Neither is there any allegation that any of the moneys, funds or credits of the bank were converted to the use, benefit or gain of the defendant or some other company or person other than the bank of which the defendant was an officer."

Chief Judge Friendly in *United States vs. Docherty*, 468 F.2d 989 (2nd Cir., Oct. 31, 1972) stated:

"The cases where courts of appeals have upheld convictions for willful misapplication have involved a considerably greater degree of iniquity *or of foreseeable loss* than anything of which Docherty knew. . . ." (Italics supplied)

Judge Friendly further stating:

"Here there was clearly no sufficient evidence of intent to 'injure' the bank. *Docherty knew he was putting his own credit on the line, and it is not suggested that he lacked the means to repay. Cf. United States v. Matot*, 146 F.2d 197 (2 Cir. 1944). *As to defrauding, even if we assume arguendo that failure to disclose the true recipient of the proceeds was a misrepresentation, lacks the element of foreseeability of damages essential even for a civil suit.* Prosser, Torts § 110, at 732 (1971). *Cf. United States v. Harper*, 33 F. 471, 481-82 (S.D. Ohio 1887); *Seals v. United States, supra*, 221 F.2d at 249. *Indeed, there will be no damages at all from the transactions in which Docherty took part, if, so far as the record shows, the notes are collectible. Beyond this we are by no means*

> *convinced that, when Congress speaks of intent to defraud in a criminal statute, it means merely the attitude of mind that would support a civil action. . . ."* (468 F.2d 995; Italics supplied)

Further, Judge Friendly warned as to the omission from the present statute of the requirement of an intent "to injure or defraud" the bank that:

> " . . . Courts must be mindful of its history and avoid undue extension as a result of the ill-conceived work of the 1948 reviser. . . ."

In *United States vs. Cooper,* 464 F.2d 648 (10th Cir., 1972), in affirming Petitioner's conviction, at 650, the Court noted the Government contended as to the exchange of the Tabernacle property, there was ". . . a great financial loss on the loan by the exchange transaction." In its opinion below affirming the order denying the Motion for New Trial on Grounds of Newly Discovered Evidence, the Tenth Circuit stated:

> " . . . United States vs. Acree, 10 Cir., 466 F.2d 1114, 1117-1118, cert. denied, 410 U.S. 913, holds that in a prosecution for misapplication of bank funds in violation of 18 U.S.C. §656 loss to the bank need be neither alleged nor proved and that *the offense occurs when the misapplication takes place.* Hence, if a new trial were granted, evidence of no loss after liquidation would not be material. . . ." (Italics supplied).

Yet, in *United States vs. Cooper*, supra, at 464 F.2d 648 at 651, the Court in sustaining Petitoner's conviction made numerous references to testimony by an FBI Agent of transactions occurring subsequent to the $65,000 (Count V) loan transaction which occurred on February 17, 1966.[6]

6. Parenthetically, it should be noted that *United States vs. Cooper*, 464 F. 2d 648, in which the Tenth Circuit considered subsequent transactions in sustaining Petitioner's conviction was decided on July 12, 1972, and *United States vs. Acree*, supra, which held ". . . that the offense occurs when the misapplication takes place. . . ", subsequent actions being immaterial, was decided on August 22, 1972.

II.

IF THE GOVERNMENT IS PERMITTED TO OBTAIN A CONVICTION ON THE BASIS OF SPECULATIVE AND CONJECTURAL ARGUMENT AND EVIDENCE AS TO THE ESSENTIAL ELEMENT OF AN "INTENT TO INJURE OR DEFRAUD" A BANK IN A PROSECUTION FOR MISAPPLICATION OF BANK FUNDS AND A DEFENDANT DENIED A NEW TRIAL ON GROUNDS OF NEWLY DISCOVERED EVIDENCE WHICH CONCLUSIVELY SHOWS SUCH SPECULATIVE AND CONJECTURAL EVIDENCE TO BE FALSE, DEFENDANT IS DENIED DUE PROCESS OF LAW UNDER THE FIFTH AMENDMENT.

In *United States vs. Acree,* supra, the Court also held in a misapplication case that intent ". . . may be inferred from the facts and circumstances developed during trial. . . ." (466 F.2d 1117) and also ". . . that intent is basically a fact question for the jury. . ." (466 F.2d 1117). Thus, where the Government in a prosecution for misapplication of bank funds proceeds on the basis of speculative and conjectural argument and evidence, the existence of substantial financial losses which subsequently newly discovered evidence shows to be false and untrue, a defendant is denied a fair and impartial trial as guaranteed by due process under the Fifth Amendment despite his trial testimony denying the existence of any such losses, since where a defendant's testimony is the only direct evidence upon his intent, this is ". . . never impressive in the mouth of the accused. . . ." (*United States vs. Matot,* 146 F.2d 197 (2nd Cir., 1944)).

Clearly, if ". . . the offense occurs when the misapplication takes place. . . ." (A-3, infra,) the speculative

and conjectural evidence of ultimate losses relied upon by the Government at Peitioner's trial would be inadmissible on a new trial.

To uphold the decision of the Tenth Circuit below would give the Government carte blanche authority to initiate prosecutions for criminal misapplication of bank funds under 18 U.S.C. §656 and obtain convictions based on speculative and conjectural argument and evidence of substantial financial losses and deny a defendant any remedy when newly discovered evidence conclusively shows the non-existence of any such financial losses. To uphold the decision below would encourage premature speedy indictments, trials and convictions of misapplication of bank funds and permit proof of the element of an intent to injure or defraud the bank to be based upon pure speculation and conjecture as to the existence of very substantial financial losses, which, although untrue, are unprovable at the time of trial.

Contrary to the opinion below, *not* every conviction for misapplications of funds of a bank under liquidation would be suspect until completion of liquidation and subject to attack if the liquidation established no loss (see A- , infra). Such convictions would only be subject to attack in instances where the Government itself has injected substantial financial losses by way of conjecture and speculation into the case.

III.

THE QUESTION PRESENTED IS NOVEL AND HAS NEVER PREVIOUSLY BEEN DETERMINED BY THIS COURT, BUT SHOULD BE DETERMINED BECAUSE OF ITS IMPORTANCE IN THE ADMINISTRATION OF CRIMINAL JUSTICE AND TO AVOID JUDICIAL LEGISLATION IN VIOLATION OF THE DOCTRINE OF SEPARATION OF POWERS.

The leading decisions of this court which dealt with "misapplication" of bank funds, as herein cited, were

decided in the 1880's and early 1900's, long before the adoption of many modern-day banking practices and prior to the ". . . ill-conceived work of the 1948 reviser. . . ." as Chief Judge Friendly stated regarding the omission of the language of "an intent to injure or defraud" a bank from present statute, 18 U.S.C. §656.

The importance of the question is illustrated by the dramatic inc rease in prosecutions for violations of 18 U.S.C. §656 and 1005 during the 10-year period 1964-1973, as shown by the chart of accumulated statistics for said period furnished by the Office of the Director of the Administrative Office of the United States Courts, reproduced at page A- , infra.[7] As shown by said chart, the total number of defendants increased from 512 in 1964 during each succeeding year until 1971 when there was 958 total defendants and 917 for the fiscal year 1972 and 887 total defendants for the fiscal year 1973.

The nebulous character of "willfully misapplies" is continually ensnaring bankers, lawyers, and laymen alike. Petitioner and Docherty in *United States vs. Docherty,* supra, were both attorneys as was Tronolone in *Tronolone vs. Bar Assn. of Erie County,* 337 N.Y.Supp.2d 65 (1972) who, like Docherty, became involved with the same Edward Evans involved in *United States vs. Docherty,* supra. These are but examples. Very recent newspaper accounts noted the indictment of the present chairman of the board of trustees of the American Medical Association for "misapplication", some counts apparently involving "indirect loans".

7. This chart was furnished pursuant to a request for a yearly breakdown of statistics as to prosecutions for "misapplication" pursuant to 18 U.S.C. § 656. Apparently, statistics are unavailable as to the breakdown of prosecutions for the individual offenses of embezzlement, abstraction, purloining or willfully misapplying bank funds, all of said prosecutions under 18 U.S.C. § 656 being lumped under the term of "Bank Embezzlement", the transmittal letter accompanying said chart also advising that the statistics in said chart appear in the Annual Report of the Director for the years noted in Tables D-4 and D-4 and that the Office of the Director was not able to separate prosecutions under the two sections (18 U.S.C. § 656 and 18 U.S.C. § 1005).

Petitioner's conviction was based on an "indirect" loan to highly successful and extremely financially solvent businessmen, who acknowledged their liability on said loan, said loan being well secured and fully paid with interest. Said "indirect loan" was not prohibited by law and neither the indictment so charged nor did the Government so contend.[8] Yet, a conviction was obtained and sustained on appeal.

The Tenth Circuit by its decisions in *United States vs. Acree,* supra, *United States vs. Cooper,* supra, and by its decision to which this petition is directed has expanded the concept of "willfully misapplies" far beyond that of any other court and beyond the "verge" of 18 U.S.C. §656 to which Chief Judge Friendly referred in *United States vs. Docherty,* supra. Not only are indirect loans to financially responsible real individuals and which are evidenced by ". . . a good note financially"[9], made a "misapplication", but a defendant is prohibited from showing the bank financially benefitted in refutation of the charge of an "intent to insure or defraud" the bank.[10]

Since as to the opinion below, quoted at page A-1, infra, the Tenth Circuit directed "DO NOT PUBLISH" future defendants cannot even readily ascertain that evidence of financial benefits to the bank is immaterial on the issue of the element of an intent to injure or defraud the bank.

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8. See Count V, page , supra. Parenthetically, the failure of the indictment to charge said transaction as "an unlawful one" rendered the indictment bad (*United States vs. Wiggenhorn*, supra, at 312 F. 2d 292).

9. The very language used by the trial judge quoted at page , supra.

10. Further, it would appear to be immaterial as to whether such evidence of financial benefit was available at time of trial or subsequently available as newly discovered evidence since if admissible if available at time of trial and not admissible as newly discovered evidence, defendants charged with the same offense would be treated differently in violation of the concept of "discrimination" as prohibited by the Fifth Amendment. See: *Hurd vs. Hodge*, 334 U.S. 24 (1948) and *Thiel vs. Southern Pacific Co.*, 328 U.S. 217 (1946).

IV.

THE DECISION BELOW HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

The opinion below states:

> "We are not impressed with the argument that if the self-serving statements of appellant and his co-defendant with relation to no loss were bolstered by the post-trial proof of no loss, a jury might not be convinced that the requisite intent to defraud was established. This is pure speculation. . . ." (Pg. A-3, infra.)

Thus, the Court has usurped what is a jury function by predetermination as to the effect of the new evidence in a new trial. Also see: 58 AmJur 2d, New Trial, § 174 pg. 389; 58 AmJur 2d, New Trial, § 176, pg. 393; 58 AmJur2d, New Trial, § 177; *State vs. Mounkes,* 138 P. 410, (Kans., 1914); *State vs. Hawkins,* 114 S.E. 538, (S.Car., 1922); *State vs. Wiley,* 91 S.E. 382 (S.Car., 1917); *State vs. Wynne,* 96 So. 15 (La., 1923); *Davis vs. Sim,* 140 P. 851 (Kans., 1914); *Bridgham vs. Hinds,* 115 A. 197 (Me., 1921); *Hodnett vs. City of Danville,* 146 S.E. 281 (Va., 1929); *Acres vs. Commonwealth,* 156 S.E. 763 (Va., 1931); *Powell vs. Commonwealth,* 112 S.E. 657 (Va., 1922); *Forshagen vs. Payne,* 225 S.W.2d 229 (Tex., 1949); *State vs. Bell,* 137 So.2d 342 (La., 1962); *United States vs. Gorton,* 246 F.Supp. 522 (Dist. of Colum., 1965); *Blocker vs. United States,* 274 F.2d 572 (D.C. Cir., 1959). Also see 58 AmJur2d, New Trial, § 181, pages 396-397. See also *Larison vs. Taylor,* 83 Colo. 430, 266 P. 217 (1928).

CONCLUSION

For the reasons aforesaid, it is respectfully requested that a Writ of Certiorari be granted to review the judgment of

the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

JULY TERM, 1973

UNITED STATES OF AMERICA,	)	
Plaintiff-Appellee,	)	No. 73-1141
v.	)	
FRANCIS SALZAR,	)	
Defendant-Appellant.	)	

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF COLORADO
(D.C. No. 70-CR-58)

W. Allen Spurgeon, Assistant United States Attorney (James L. Treece, United States Attorney, on the brief), for Plaintiff-Appellee.

Edward H. Sherman (Charles S. Vigil on the brief) for Defendant-Appellant.

Before BREITENSTEIN, HILL and McWILLIAMS, Circuit Judges.

PER CURIAM.

This is an appeal from the denial of a motion for a new trial asserting newly discovered evidence. Appellant and others were indicted for conspiracy to misapply funds of a FDIC bank in violation of 18 U.S.C. §656 and for substantive violations of that section. Appellant was convicted on the conspiracy count and on one substantive

count. He and others appealed and their convictions were affirmed. United States v. Cooper, 10 Cir., 464 F.2d 648. Certiorari was denied, Salazar v. United States, 409 U.S. 1107, and rehearing was denied on February 20, 1973, 410 U.S. 959. The mandate required surrender on March 12. The new trial motion was filed on March 9 and denied on March 12.

The bank in question was closed on January 30, 1969, and thereafter liquidated. The uncontested allegations of the new trial motion were that upon completion of liquidation no creditor, depositor, the FDIC, or shareholder will sustain any loss, Appellant asserts that evidence of no loss became available on March 5, 1973, and was not previously available.

The trial was held in December, 1970. Appellant says that through argument, innuendo, and conjecture the prosecution made it appear to the jury that the bank had sustained a substantial loss. A defense witness, the Colorado State Bank Commissioner, testified that no depositor lost any money and that FDIC had advanced $3,000,000 to cover potential losses. Appellant Salazar and co-defendant Cooper each testified that not only would there be no financial losses but there would be a substantial profit.

Appellant's theory is that the post-trial developments establishing no loss are newly discovered facts which bear on the question of the intent necessary to sustain a §656 conviction, and entitle him to a new trial. The essence of his argument is that he did not have a fair trial because he could rebut the prosecution's insinuations of loss only by the self-serving statements made by him and a co-defendant.

A motion for a new trial is generally not regarded with favor, is granted only with great caution, is addressed to the sound discretion of the trial court, and, if based on newly discovered evidence, that evidence must be such as would probably produce an acquittal. United States v. Perea, 10 Cir., 458 F.2d 535, 536, and United States v. Gleeson, 10 Cir., 411 F.2d 1091, 1094. United States v. Acree, 10 Cir., 466 F.2d 1114, 1117-1118, cert. denied 410 U.S. 913, holds

that in a prosecution for misapplication of bank funds in violation of 18 U.S.C. §656 loss to the bank need be neither alleged nor proved and that the offense occurs when the misapplication takes place. Hence, if a new trial were granted, evidence of no loss after liquidation would not be material.

We are not impressed with the argument that if the self-serving statements of appellant and his co-defendant with relation to no loss were bolstered by the post-trial proof of no loss, a jury might not be convinced that the requisite intent to defraud was established. This is sheer speculation. United States v. Docherty, 2 Cir., 468 F.2d 989, upon which appellant relies heavily, is not pertinent. That case was concerned with an aider and abettor, not with a bank officer. The decision was not concerned with, and did not discuss, the question of materiality of proof of no loss in a prosecution of a bank officer for misapplication in violation of §656.

If appellant's position were accepted, every conviction for misapplication of funds of a bank under liquidation would be suspect until after completion of liquidation and would be subject to attack if the liquidation established by facts occurring several years after misapplication and affected by the economic turn of events.

We believe that the appellant had a fair trial and that the trial court did not abuse its discretion in denying the motion for new trial.

The motion of the government to dismiss the appeal is denied and the order denying the motion for new trial is affirmed.

90 United States District Courts
(Excludes the District of Columbia and Territories)
Disposition of Defendants Charged with Bank Embezzlement (18:656, 1005)
Showing Type of Sentence, by District, Fiscal Years 1964 - 1973

Fiscal year	Total defendants	Not Convicted				Convicted and Sentenced				Type of Sentence									Average sentence of imprisonment (months)
				Acquitted by				Convicted by		Imprisonment[1]									
		Total	Dismissed	Court	Jury	Total	Plea of guilty or nolo contendere	Court	Jury	Total	Split[2] sentence	1 year and 1 day and under	Over 1 year 1 day to 3 years	3-5 years	5 years and over	Probation	Fine only	Other	
1964...	512	38	22	5	11	474	454	3	17	97	-*	43	28	18	8	375	2	-	19.6
1965...	518	42	25	3	14	476	459	4	13	120	41	25	26	19	9	350	2	4	18.8
1966...	530	42	33	-	9	488	469	5	14	105	36	17	22	17	13	368	13	2	25.5
1967...	546	54	31	7	16	492	471	3	18	107	28	22	26	28	3	382	3	-	19.6
1968...	558	42	23	8	11	516	476	10	30	98	33	11	26	14	14	409	6	3	25.7
1969...	611	44	30	3	11	567	547	3	17	98	46	12	11	14	15	457	7	5	32.6
1970...	678	38	28	3	7	640	614	11	15	130	57	18	21	20	14	503	6	1	22.6
1971...	958	142	118	7	17	816	765	17	34	166	57	27	34	32	16	634	12	4	21.8
1972...	917	95	73	6	16	822	773	9	40	161	62	27	32	25	15	634	18	9	21.3
1973...	887	67	46	4	17	820	756	12	52	208	76	33	38	46	15	596	11	5	21.7

[1] Includes sentences of more than 6 months which are to be followed by a term of probation (mixed sentences).
[2] A split sentence is a sentence on a one-count indictment of 6 months or less in a jail-type institution followed by a term of probation. 18 U.S.C. 3651. Included in these figures are mixed sentences involving confinement for 6 months or less on one count, to be followed by a term of probation on one or more counts.

*Split sentences are included in prison terms less than one year and one day.